BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES E. GARNER Claimant VS. **KITSELMAN CONSTRUCTION, LLC** Respondent AND **AUTO OWNERS MUTUAL** Insurance Carrier	)	Docket No. 1,069,084

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) request review of the July 10, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Brad E. Avery. Roger D. Fincher of Topeka, Kansas, appeared for claimant. Matthew M. Hogan of Overland Park, Kansas, appeared for respondent.

The ALJ found claimant suffered personal injury by accident arising out of and in the course of his employment with respondent on December 20, 2013 and the accident was the prevailing factor in causing claimant's injury, medical condition, and need for treatment. The ALJ determined respondent had actual knowledge of claimant's injury on the date of accident. The ALJ ordered temporary total disability (TTD) benefits beginning March 4, 2014, medical treatment and payment of medical bills.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 1, 2014, Preliminary Hearing and the exhibits, and the transcript of the April 9, 2014, evidentiary deposition of David Kurt Kitselman, Jr., together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant failed to provide timely notice of an alleged injury, as he did not identify his shoulder condition as work-related at any time before March 19, 2014, the date he filed an Application for Hearing in this matter. Respondent maintains the

medical records submitted to the ALJ demonstrate a shoulder injury occurring prior to the amended date of accident. Further, respondent argues claimant should not be awarded TTD benefits when he left employment after suffering an unrelated back injury.

Claimant contends the ALJ's Order should be affirmed. Claimant argues respondent had actual knowledge of the injury at the time of the incident, thereby waiving the statutory notice requirements of K.S.A. 2013 Supp. 44-520(a). Claimant maintains the award of TTD benefits is appropriate because he could not have continued working at respondent without medical intervention for his shoulder, notwithstanding his untimely back injury.

The issues for the Board's review are:

1. Did claimant provide timely notice of his accidental injury?

2. Is claimant entitled to TTD benefits?

FINDINGS OF FACT

Claimant worked for respondent for approximately 3.5 years as a construction laborer. On or about December 20, 2013, claimant, Kurt Kitselman, and another coworker were constructing a metal building in Emporia, Kansas. Claimant testified he was assisting in positioning purlins, which are metal beams weighing approximately 80 pounds and over 20 feet long, across the rafters of the structure when he felt a tear in his right shoulder. Claimant stated he felt immediate pain on the top of his shoulder. He climbed down from the roof and informed Mr. Kitselman, owner of respondent, he thought he "tore something loose in [his] shoulder."[1] Claimant testified:

> Q. And you had just climbed down from the rafters when you told him this?
>
> A. Yes.
>
> Q. Did you – did he say anything back to you?
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> A. He said – he was on his knees, bolting something together. And he said, "I can't pay you with your arm hanging down."[2]

[1] P.H. Trans. at 11.

[2] *Id*.

Claimant testified neither his coworker nor Mr. Kitselman witnessed the event. Claimant stated he did not tell Mr. Kitselman exactly how he hurt his shoulder because "[Mr. Kitselman] was there when [claimant] did it."[3]

Mr. Kitselman disputed claimant's testimony, stating, "There was nothing that I can recall that happened that I would consider it was an injury."[4] Mr. Kitselman explained claimant did not fall, nor did anything fall on claimant. Further, Mr. Kitselman noted complaints of general aches and pains are common in his line of work. Mr. Kitselman testified:

> Q. So as far as what he specifically told you about his shoulder bothering him, you don't recall any specifics; is that right?
>
> A. No. I remember him not being able to use his arm very well that day and I remember telling him that he might as well go home because if he can't work then why would I pay him to keep working. And [claimant] is a very tough individual and he said, no, I'm good, let's just keep going. . . . And came to work the next day and his shoulder was bothering him and worked all day long. And I remember specifically telling him that he should probably not come to work because he's basically – why would I be paying him if he can't do the work that he's needing to do or because he was up high, I don't need that type of situation to where he falls because he can't hold himself right or whatever.[5]

Mr. Kitselman later testified he was aware claimant's shoulder was bothering him, and claimant "couldn't lift his arm up past 90 degrees at one point."[6] Mr. Kitselman also stated claimant never mentioned the shoulder condition was work-related, and he was unaware of claimant's shoulder condition until he received a copy of the Application for Hearing filed March 19, 2014.

Claimant stated Mr. Kitselman visited him at his home following the receipt of the Application for Hearing. Claimant indicated Mr. Kitselman said, during their conversation, that respondent would pay for workers compensation. Claimant testified he was not aware he was not receiving compensation until he contacted his attorney. Further, claimant testified he was never advised by respondent that he was not an employee but an independent contractor.

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[3] *Id*. at 14.

[4] Kitselman Depo. at 22.

[5] *Id*. at 23-24.

[6] P.H. Trans. at 73.

Mr. Kitselman agreed with claimant insofar as he did visit claimant's home. Mr. Kitselman described the encounter:

> I just got my papers in the mail after work that day. So I drove specifically over to [claimant's] house that evening because I thought it was over his back. I had no clue it was over his shoulder. . . . So I had no clue he was even going that route with his shoulder. And the reason being is because I didn't even realize his shoulder was injured because of – or allegedly because of our work.[7]

Mr. Kitselman denied having told claimant he would pay for the workers compensation claim. Mr. Kitselman said, "I told him that he wasn't covered underneath my work comp."[8] He explained claimant was not an employee but was instead a subcontractor. Claimant was paid in cash from 2011 through part of 2013, when he was then paid by check. Respondent sent claimant a 1099 for the 2013 tax year. Mr. Kitselman testified:

> I just told [claimant], it was an understanding that he was getting paid cash for two years. . . . Because we both had an understanding that he wasn't an employee, he was a subcontractor. And he was working underneath the table.[9]

At preliminary hearing, respondent admitted an employer/employee relationship existed on December 20, 2013.

The original Application for Hearing, filed March 19, 2014, alleged an accident date on or about November 14, 2013, in which claimant injured his right shoulder. Claimant testified he originally believed the incident occurred in November 2013; however, respondent noted the job in question occurred near the end of December 2013. Claimant testified:

> Q. At that point in time what date did you think this happened? Somewhere in November. Is that right?
>
> A. When we took – yeah. Yes. I, me and my wife both thought it was in November when I got hurt.
>
> . . . .
>
> Q. But you're here today and you think that it was December 20th?

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[7] *Id*. at 69.

[8] Kistleman Depo. at 29.

[9] P.H. Trans. at 76.

> A. Mr. Kitselman came to my house and we talked about it. And he said, no, [the job] was in December. And he got his records, so that's why I went with that.[10]

Claimant testified his family doctor referred him to Dr. Edward Letourneau for joint pain. On November 20, 2013, Dr. Letourneau examined and obtained x-rays of claimant's right shoulder, noting claimant appeared to have a fair amount of mechanical shoulder pain. Dr. Letourneau recorded claimant's history of right shoulder difficulties resulting in surgery in 1995, and the x-rays revealed a widening of the acromioclavicular joint consistent with past surgery. Dr. Letourneau indicated claimant had osteoarthritis with no evidence of inflammatory disease and provided injections to both of claimant's shoulders.

Claimant testified he had no problems with his right shoulder from the time of his 1995 surgery to the time of the 2013 accident. He stated the injections provided by Dr. Letourneau provided pain relief in his shoulders for approximately two weeks before his pain returned. Claimant explained he continued to work for respondent although his pain worsened over time.

Mr. Kitselman stated claimant fully used his right shoulder following the injections. Mr. Kitselman said he believed claimant received the injections subsequent to January 1, 2014. He testified:

> Q. Okay. Do you recall when he got a shot in his shoulder? Does that ring a bell?
>
> A. I do remember that.
>
> Q. Did that relieve his condition for awhile?
>
> A. It did.
>
> Q. Okay. And then did he begin doing more activities at work?
>
> A. He did. And I can't remember exactly when he got that Cortizone [*sic*] shot but it was pretty – I mean, it was within maybe a week, maybe a week and a half of him complaining about his arm.[11]

Claimant continued to work for respondent until February 28, 2014, when he was hospitalized regarding his back. Claimant testified he has "a bad back" and it "just goes out."[12] Claimant explained his back went out while he was at home, and he was transferred to the hospital where he remained for four days. Claimant did not return to

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[10] *Id*. at 43-44.

[11] *Id*. at 65-66.

[12] *Id*. at 49.

work at respondent following his hospitalization. Claimant testified he did not recall informing Mr. Kitselman he would not return to work because of his back problems. Mr. Kitselman testified:

> Q. Okay. The last date [claimant] did affiliate with you or work for you or come over to wherever you were working, did he leave the job and say I'm not coming back or did you tell him not to come back or how did the relationship end, if it did?
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> A. If I remember right, there was weather so we didn't work maybe on a Friday, so he might have worked on a Thursday. We didn't work on a Friday because of the weather. And then I think he hurt his back on a Saturday and went to the hospital for a week. And then couple weeks later I get a letter from you.[13]

Claimant returned to Dr. Letourneau on February 25, 2014. Records indicate claimant was referred to Dr. Sushmita Veloor for chronic pain treatment but did not keep his appointment. Further, claimant was prescribed Cymbalta but was not taking the medication as he could not afford it. Records indicate claimant was attempting to be seen by chronic pain physician Dr. Steve Simon but was unable to do so. Dr. Letourneau noted an MRI of claimant's right shoulder was the only way to determine whether a tear existed, but claimant declined the MRI because he wanted "to see if it can be seen as Worker's Comp."[14]

Claimant was seen by Dr. James Seeman, his primary care physician, on March 11, 2014. Claimant followed up with Dr. Seeman after his hospitalization, and Dr. Seeman's examination focused on claimant's back. Dr. Seeman wrote, "His shoulder pain is still under investigation and he believes it may be Worker's Compensation related and therefore I will not intervene with his shoulder at this time."[15]

Dr. Daniel Zimmerman examined claimant on April 3, 2014, at claimant's counsel's request. Claimant's chief complaint was his right shoulder injury. Dr. Zimmerman reviewed claimant's medical records and history, which included an accident date of "shortly before Thanksgiving 2013."[16] After performing a physical examination, Dr. Zimmerman noted claimant required "further medical attention for the right shoulder rotator cuff tear that [he believes] is present at this time," and claimant had not reached maximum medical improvement.[17] Dr. Zimmerman recommended claimant obtain an MRI of the right

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[13] Kitselman Depo. at 20.

[14] P.H. Trans., Cl. Ex. 3 at 11.

[15] *Id*. at 14.

[16] P.H. Trans., Cl. Ex. 1 at 3.

[17] *Id.* at 5.

shoulder, treat his pain and discomfort with applied heat and over-the-counter Ibuprofen, and imposed physical restrictions. Dr. Zimmerman opined:

> The prevailing factor for the right shoulder rotator cuff tear is the accident that occurred around Thanksgiving of 2013 when carrying out job duties in his employment for [respondent].[18]

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-520 states:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
>
> (A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;
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> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
>
> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
>
> Notice may be given orally or in writing.
>
> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
>
> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
>
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

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[18] *Id*.

> (b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
>
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

K.S.A. 2013 Supp. 44-508(f)(1) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

K.S.A. 2013 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[19] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[20]

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[19] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[20] K.S.A. 2013 Supp. 44-555c(j).

ANALYSIS

1. Did claimant provide timely notice of his accidental injury?

The determination of whether timely notice was given comes down to the credibility of the two witnesses that testified at the preliminary hearing. Claimant testified he told Mr. Kistelman he tore something loose in his shoulder. Respondent says claimant told him his shoulder was bothering him, but did not give a specific mechanism of injury. Essentially, by finding respondent had knowledge of the injury, the ALJ found claimant's testimony to be more credible. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony.

Based upon the evidence presented, the ALJ concluded claimant presented sufficient evidence to prove he gave oral notice of his injury to Mr. Kistelman on December 20, 2013. This Board Member will not disturb that finding at this time.

2. Is claimant entitled to TTD benefits?

Respondent claims TTD is not appropriate because it is related to an unrelated injury, not traceable to claimant's work with respondent. Contrary to respondent's argument, the ALJ ordered TTD. The ALJ did not exceed his jurisdiction in determining payment of TTD was appropriate for an otherwise compensable injury. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation, and the payment of temporary disability compensation. K.S.A. 44-534a also specifically gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. The ALJ's authority includes the possibility he decided the matter incorrectly.[21]

The Board can review only those issues listed in K.S.A. 2013 Supp. 44-534a(a)(2). Those issues are: (1) whether the employee suffered an accident, repetitive trauma or resulting injury, (2) whether the injury arose out of and in the course of the employee's employment, (3) whether notice is given, or (4) whether certain defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the claim under the Workers Compensation Act.[22] The Board can also review preliminary decisions when a party alleges the ALJ exceeded his or her jurisdiction.[23]

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[21] See *Alleva v. Wichita Business Journal, Inc.*, No. 202,618, 1998 WL 599406 (Kan. WCAB Aug. 11, 1998).

[22] See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[23] K.S.A. 2012 Supp. 44-551(i)(2)(A).

Since a review of the ALJ's order by respondent does not raise an issue of compensability enumerated in K.S.A. 2013 Supp. 44-534a(2), and there has been no showing the ALJ exceeded his authority, the application for Board review in this issue will not be considered for lack of jurisdiction."[24]

CONCLUSION

Claimant gave timely notice of his injury to respondent. The Board does not have jurisdiction to review the ALJ's order for TTD.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated July 10, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2014.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Honorable Brad E. Avery, Administrative Law Judge

[24] *Gosnell v. Adventures While Growing Childcare Center, Inc.*, No. 1,069,327, 2014 WL 4402476 (Kan. WCAB Aug. 18, 2014); *Willis v. Clearview City*, No. 1,067,116, 2014 WL 1340598 (Kan. WCAB Mar. 24, 2014); see also *Chappell v. Sugar Creek Packing Co.*, No. 1,068,774, 2014 WL 3055470 (Kan. WCAB June 5, 2014); *Reineke v. Preferred Personnel, Inc.*, No. 1,067,501, 2014 WL 889882 (Kan. WCAB Feb. 28, 2014); *Ramirez v. Murfin Drilling Co., Inc.,* No. 1,061,372, 2014 WL 889872 (Kan. WCAB Feb. 10, 2014); *Beaver v. Spangles*, No. 1,067,204, 2014 WL 517253 (Kan. WCAB Jan. 16, 2014); *Dominguez-Rodriguez v. Amarr Garage Doors*, No. 1,058,613, 2012 WL 1652979 (Kan. WCAB Apr. 24, 2012).